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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LUNDY LOEUN,

Plaintiff and Respondent,

v.

PETRE B. PROHINITCHI,

Defendant and Appellant.

E047839

(Super.Ct.No. CIVSS700076)

OPINION

APPEAL from the Superior Court of San Bernardino County. John P. Wade,
Judge. Affirmed.

Petre Prohinitchi, in pro. per., for defendant and appellant.

Carl F. Herbold for Plaintiff and Respondent.

Plaintiff and respondent Lundy Loeun sued defendant and appellant Peter B. Prohinitchi in a dispute over the rental of a business premises for use as a restaurant. On the day of trial, defendant, representing himself in propria persona, requested a continuance of the trial. The court denied the continuance and the trial proceeded. The court gave judgment for the plaintiff, and defendant appeals. The sole issue raised on

appeal is whether the court abused its discretion in denying the continuance. The contention is without merit, and we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff paid a deposit of \$13,500 to rent defendant's commercial premises for use as a restaurant. When the plaintiff went to take possession of the premises, the space was not ready for occupancy. The parties apparently amended the lease to compensate the plaintiff for the delay in opening; plaintiff also agreed to pay certain vendors for work that defendant was to perform to prepare the premises for use. Defendant declared the premises ready for occupancy and then later demanded that plaintiff take possession. The parties met to draft a new lease, but negotiations broke down. Plaintiff removed all of his personal property and supplies from the restaurant. Plaintiff filed the action below for breach of contract and fraud.

The matter was set for a court trial on July 21, 2008. On the day of trial, defendant, who was representing himself, sent a messenger to the court with a handwritten document asking for a continuance, of a minimum of 15 days. At the time appointed for trial to begin, defendant himself appeared. Defendant asserted that he had been treated in a hospital emergency room the day before trial and had been released, but that he was on "heavy sedation" for pain in his chest. He presented a copy of the emergency room physician's discharge instructions, which indicated that defendant had suffered a strain of the muscles between his ribs, and that this type of injury causes increased pain with certain movements or deep breathing, and should heal in a few days

to a few weeks. Defendant was instructed to rest, to avoid heavy lifting or strenuous exertion which caused pain. He was prescribed pain medication.

When defendant's messenger conveyed defendant's handwritten request for continuance, the court stated, "I notified the person who delivered this that this was insufficient . . . for purposes of continuing the trial, and the request for continuance is denied."

The court then invited opening statements. After the plaintiff's opening statement, defendant responded to the court's inquiry whether defendant wished to make an opening statement by renewing his request for a continuance: "Your Honor, I'm under heavy sedation of medication, which is Demerol, and I was staying with a friend of mine in the house today. I have pains in my heart muscle and my back and my neck, and I'm coming here because you asked me to come here, but I'm not in a position to be able to defend myself to this court at this moment. [¶] And I'm also—I'm the defendant and also I'm in pro per. I'm unrepresented. So it would not be fair for this court to put me under this medical condition that I am, which is stated by the doctors and will be stated in the future because I have to go to the doctor immediately, into this condition, to be able to be prepared or to respond to the questions and, behind any doubt, to establish the validity of those things and to be—have a fair try to win in this case. At this point, probably, I need an attorney to represent me because I cannot do it. And on this short notice, I was turned down by [an attorney]."

The court again denied the motion for a continuance.

The matter proceeded to trial. The court issued a tentative decision in favor of the plaintiff. After other proceedings, the court finally entered judgment for the plaintiff on December 18, 2008.

Defendant moved for a new trial. The trial court denied this motion.

Plaintiff mailed the notice of entry of judgment to defendant on December 26, 2008. The notice of entry of judgment was then filed with the court on December 29, 2008.

Defendant filed a notice of appeal.

ANALYSIS

I. Untimeliness of the Appeal

Plaintiff raises as a threshold issue that defendant's appeal is untimely. Defendant should have filed his appeal by the 60th day after he was served with the notice of entry of judgment. (Cal. Rules of Court, rule 8.104(a)(2).) Plaintiff urges that the 60th day was Friday, February 27, 2009, but defendant's notice of appeal was not filed until Monday, March 2, 2009. What is unclear from the record, however, is whether Friday, February 27, 2009, was a day on which the courts were open for business. For that reason, although defendant's notice of appeal was filed on the 63rd day after the notice of entry of judgment was filed, we address the merits of defendant's contention on appeal.

II. The Trial Court Properly Denied Defendant's Motion for a Continuance

Defendant contends that the trial court erred in denying his motion for a continuance on the day of trial. "Continuances are granted only on an affirmative showing of good cause requiring the continuance. [Citations.] Reviewing courts must

uphold a trial court's choice not to grant a continuance unless the court has abused its discretion in so doing. [Citation.]” (*In re Marriage of Falcone* (2008) 164 Cal.App.4th 814, 823.)

Defendant failed to show good cause to support the motion, and consequently has failed to demonstrate that the trial court abused its discretion in denying the continuance.

On the day set for trial, defendant at first sent a messenger with a handwritten document, labeled as a motion, consisting in essence of defendant's declaration and attached hospital documents. Defendant averred that “[due] to a heavy sedation of pain[] medicine . . . every 6 hr. and being in e[x]cruciat[ing] pain I am in no condition to sta[y] in tr[ia]l.” He asked that the trial be postponed a “minimum 15 days from [this] day.” The attached document was a discharge summary from his visit to the emergency room the previous day. The discharge instructions themselves indicated that defendant had been evaluated for atypical chest pain or chest wall pain, and that he had suffered a muscular strain of his chest, possibly as a result of severe coughing, strenuous lifting, or twisting injuries. Certain movements or deep breathing could increase pain. The condition could heal in a few days to a few weeks. Defendant was instructed to “Rest. Avoid heavy lifting or strenuous exertion. Avoid any activity that causes pain.” He was prescribed a limited amount of pain medication (Vicodin or hydrocodone).

Defendant himself appeared in court after he sent the messenger with the continuance request.

The trial court properly denied the purported motion for a continuance. First, defendant failed to make a proper noticed or ex parte motion. (Cal. Rules of Court, rule

3.1332(b).) The motion was required to be supported by declarations, but the discharge instructions on which defendant relied were not authenticated in any way and did not comply with the requirements for a declaration.

Second, defendant presented no proper ground for a continuance. California Rules of Court, rule 3.1332(c) and (d) prescribe the allowable grounds for continuance, and the factors or circumstances the court should take into consideration in ruling on a motion. Unavailability of a party, witness or counsel because of death, illness or other excusable circumstances would be a proper ground. Defendant failed to show any such unavailability, however, inasmuch as he in fact was available. The other factors which the court may consider include the proximity of the trial date, previous continuances, the length of the requested continuance, possible prejudice to parties or witnesses, and so forth. Here, the motion was made on the day of trial; the case had been delayed previously by various considerations; defendant requested an open-ended continuance of a “minimum” of 15 days; and plaintiff and plaintiff’s counsel were present, ready and prepared for trial at that time.

Third, to the extent that the matters in the hospital discharge instructions could be considered, the facts did not support the requested continuance. Defendant had suffered a muscular strain and was prescribed pain medication. He was instructed to avoid “heavy lifting” or “strenuous exertion.” There was no hint that defendant was restricted from sedentary pursuits. In addition, as defendant was personally present in court, the trial court could assess defendant’s physical and mental status for itself. Defendant was able to understand and respond appropriately to questioning. He was able to argue his case,

and to examine and cross-examination witnesses. Nothing on the record indicates any disability at all, much less an illness or condition which rendered him unavailable to participate in the trial.

The trial court did not abuse its discretion in denying defendant's request for a continuance.

III. The Court Properly Denied the Motion for a New Trial

After the court gave its judgment, defendant moved for a new trial. The stated grounds were irregularity in the proceedings, abuse of the court's discretion, and surprise or unforeseen circumstances. All of these grounds were predicated on the court's denial of defendant's motion for a continuance. Defendant argued that the pain medication he had taken had prevented him from producing his evidence in court. Defendant claimed that he had been heavily sedated for a "heart problem," which was ignored by the trial court. He attached a declaration stating that he had been given "strong medication to ease [his] heart pains the day of the trial," and that he was therefore "not functioning normally because of the medication." He stated that, if a new trial were granted, he would "produce evidence" to dispute the allegations of plaintiff's complaint. Defendant relied again on the hospital discharge instructions.

We review the trial court's determination whether to grant or deny a motion for new trial for abuse of discretion. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859.) There was no abuse of discretion here, for most of the same reasons that the court did not abuse its discretion in denying the motion for a continuance. Again, defendant failed to support the continuance motion with proper affidavits or declarations.

He did not present a proper ground for the continuance (unavailability) because he was in fact available. His claim that he was impaired was not supported by the court's own observations of defendant's conduct. He fully participated in the trial, conducted cross-examination of the plaintiff, and presented his own evidence and argument. Defendant has not shown that the trial court abused its discretion with respect to the motion for continuance, and therefore has also necessarily failed to show any irregularity in proceedings or abuse of discretion warranting a new trial.

Neither has defendant substantiated his claim of accident or surprise against which he could not have guarded. Even though defendant may have suffered an unexpected injury, the accident or surprise has no nexus to the legal proceedings. For example, although defendant intimates that he was somehow prevented from presenting the evidence to support his case at trial, he never hints—even now on appeal—what different or additional evidence he could bring to bear on the issues. His episode of chest pain occurred one day before the trial was scheduled to begin. All of defendant's preparations, including marshaling any relevant evidence, however, should have been in place well before then. Nothing about defendant's chest strain prevented him from preparing his case before trial.

The trial court properly denied defendant's motion for a new trial.¹

¹ Plaintiff has, in the respondent's brief, requested sanctions against defendant for filing a frivolous appeal. Plaintiff has failed to file a declaration pursuant to California Rules of Court, rule 8.891(e)(2) to support the request. The request for sanctions is therefore denied.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to plaintiff and respondent.

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/s/ McKINSTER
J.

We concur:

/s/ HOLLENHORST
Acting P. J.

/s/ KING
J.